Cr 20/06

(5)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR (C.G.)

M.C.C.No. 31 OF 2006

Single Bench

IN THE MATTER OF -

APPLICANT

P.R. No. 3154-105
Presented by Shri Ashok Mishra
dated 14-12-05

M/S VIMAL CONSTRUCTIONS, a partnership firm represented by the partner Shri Vimal Chand Jain, aged 54 years, son of Late Shri Manik chandji Jain, resident of 22-B, South Avenue, Choube Colony, Raipur C.G.

VERSUS

NON-APPLICANT

STATE OF CHHATTISGARH
through -

(1) The Secretary, Panchayat & Rural Development deptt., D.K.S.Bhawan , Mantralaya, Raipur C.G.

(2) The Chief Engineer, P.M.G.S.Y. Civil Lines, Raipur C.G.

(3) The Executive Engineer & Member Secretary, PIU, PMGSY, Jagdalpur C.G.

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APPLICATION UNDER SECTION-11(6) OF ARBITRATION AND CONCILIATION ACT, 1996.

The above named applicant begs to submit as under -

HIGH COURT OF CHHATTISGARH AT BILASPUR
M.C.C. No. 31/ 2006

M/s. Vimal Constructions

Versus

State of Chhattisgarh & others

Order post for 21 -12-2006

Sd/-
Dhirendra Mishra
Judge

HIGH COURT OF CHHATTISGARH AT BILASPUR
MC.C. No. 31/ 2006

M/s. Vimal Constructions

Versus

State of Chhattisgarh & others

Present: Shri P.K. Jain, Adv. for the applicant.
Shri V.V.S. Murthy, Dy. Advocate General for the State.

O R D E R

Per Dhirendra Mishra, J.

The applicant has preferred this application under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of Arbitration Tribunal for settlement of disputes arising between parties out of contract agreement No. 5/2001-2002 vide Annexure A-8.

2. Case of the applicant is that the time allowed for completion of work was 6 months excluding rainy season and the same was to be reckoned from the date of issue of work order i.e. 13-3-2002 of Annexure A-2. However during the course of execution of contracted work, non-applicants committed various latches and breaches of contract and ultimately rescinded the contract of the applicant vide memo dated 1-4-2003 of Annexure A-3. As a result of illegal rescission of contract by the non-applicant, the applicant has suffered heavy financial losses and he raised a claim of Rs. 426,57,247.00 vide Annexure A-4. On failure of non-applicant No. 3 in payment of above demanded sum, arbitration clause No. 29 was invoked vide applicant's application dated 3-2-2004 addressed to Superintending Engineer/non-applicant No. 3 vide Annexure A-5. The Superintending Engineer rejected the submission of the applicant and, therefore, an appeal was preferred before the non-applicant/Chief Engineer No. 2 vide application dated 26-2-2004 of Annexure A-6. Since the non-applicants did not take any action on the application of Annexure A-6 by the applicant, the applicant vide its application dated 26-9-2005 of annexure A-7 requested for constitution of Arbitration Tribunal. Since the non-applicants have

declined to constitute Arbitration Tribunal, this application under Section 11(6) of Arbitration and Conciliation Act, 1996 has been filed for appointment of Arbitration Tribunal for settlement of the dispute arising between the parties.

3. In reply to the above, the non-applicants have stated that as per Clause 29 of the agreement, if the party is unsatisfied with the decision of the Chief Engineer, he can refer such dispute for arbitration to arbitration tribunal to be constituted by the State Government and only on failure of the State Government in constituting the arbitration tribunal, the aggrieved party can invoke the Arbitration and Conciliation Act, 1996 and since the matter at the instance of the applicant is pending before the Chief Engineer, the instant application is premature. It is further submitted that State of Chhattisgarh has constituted Chhattisgarh Arbitration Tribunal vide notification dated 1st March, 2005. The Tribunal has already started functioning with effect from 2nd September, 2005. The instant application has been filed by the applicant on 14-12-2005 i.e. after constitution of Arbitration Tribunal under C.G. Madhyastham Adhikaran Adhiniyam, 1983 (hereinafter referred to as the Adhiniyam of 1983). Sub-section (1) of Section 20 of the Adhiniyam of 1983 bars the jurisdiction of Civil Court to entertain or decide any dispute under Arbitration Act 1940 or any other law of which cognizance can be taken by the Tribunal under this Adhiniyam and, therefore the instant application is not maintainable.

4. Learned counsel for the applicant submits that a bare perusal of documents of Annexure A-5 and A-6 clearly indicates that even before constitution of the Arbitration Tribunal under the Adhiniyam of 1983, the authority under Clause 29 was seized of the dispute arising out of the contract agreement and, therefore, the bar under sub-section (1) of Section 20 of the Adhiniyam of 1983 is not attracted as the same is saved by sub-section (2) of Section 20 of the Adhiniyam of 1983. Reliance is placed in the matter of ***State of Madhya Pradesh and others –v- M/s. Chahal and company*** reported in ***1995 A.T.L.R. 537***.

5. I have heard learned counsel for the parties.

6. Relevant portion of Arbitration clause 29 of the Contract Agreement of Annexure A-8 is reproduced below:-

> **"Clause 29**- Except as otherwise provided in this contract all question and dispute relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned as to thing whatsoever in any way arising out of or relating to the contract designs, drawings specifications, estimate, concerning the works, or the execution or failing to execute the same, whether arising during the progress of the work or after the completion of abandonment thereof shall be referred to the Superintending Engineer in writing for his decision, within a period of 30 days of such occurrence. Thereupon the Superintending Engineer shall give his written instructions and/or decisions within a period of 60 days of such request. This period can be extended by mutual consent of parties.
>
> Upon receipt of written instructions or decisions the parties shall promptly proceed without delay to comply such instructions or decisions. If the Superintending Engineer fails to give his instructions or decisions in writing within a period of 60 days or mutually agreed time after being requested and if the parties are aggrieved against the decision of the S.E. the parties may within 30 days prefer an appeal to the Chief Engineer who shall afford an opportunity to the parties of being heard and to offer evidence in support of his appeal. The Chief Engineer will give his decision within 90 days. If any party is not satisfied with the decision of the Chief Engineer he can refer such disputes for arbitration to an Arbitration Tribunal to be constituted by the State Government. In case such an arbitration Tribunal is not constituted by the State Government, then the aggrieved party shall invoke Arbitration and Conciliation Act 1996- as amended till the date of such reference."

7. Thus from a bare perusal of the Arbitration Clause, it is observed that all questions and disputes arising out of the contract agreement are to be referred firstly to the Superintending Engineer within 30 days of occurrence of such dispute. If the Superintending Engineer fails to give his instructions or decisions in writing within a period of 60 days or mutually agreed time after being requested, an appeal may be preferred within 30 days to the Chief Engineer who has to give his decision within 90 days after affording an opportunity of hearing to the parties and to offer evidence in support of his appeal. An unsatisfied party with the decision of the Chief Engineer can then refer such dispute for arbitration by an Arbitration Board to be constituted by the State Government. However, after preferring appeal under Clause 29 of the contract agreement, the Chief Engineer has not given any instruction or decision in the appeal. The applicant has also not referred the dispute to the State Government for appointment of Arbitration Board for referring the dispute for arbitration.

8. Section 20 of the Adhiniyam of 1983 is reproduced as under:-

> "(20) **Bar of jurisdiction of Civil Court**-
>
> (1) As from the date of constitutions of the Tribunal and notwithstanding anything contained in Arbitration Act 1940 (No. 10 of 1940) or any other law, for the time being in force, or in any agreement or usage to the contrary, no civil court shall have jurisdiction to entertain or decide any dispute of which cognizance can be taken by the Tribunal under this Act.
>
> [(104) Notwithstanding anything contained in sub-section (1), a civil Court may entertain and decide any dispute of the nature specified in the said sub section referred to it by a person in the capacity of indigent person.

Explanation- For the purpose of this sub-section "indigent person" shall have the meaning assigned to it in the code of Civil Procedure, 1908 (No. 5 of 1908)].

(2) Nothing in sub-section (1) shall apply to any arbitration proceeding either pending before any arbitrator or umpire or before any court or authority under the provisions of Arbitration Act, or any other law relating to arbitration, and such proceedings may be continued, heard and decided in accordance with agreement or usage or provisions of Arbitration Act or any other law relating to arbitration in all their stages, as if this Act had not come into force.

9. In the matter of ***State of Madhya Pradesh and others*** (supra), the question before the Full Bench of High Court of Madhya Pradesh was whether an application under Section 20 of the Arbitration Act pending in the Civil Court prior to the date of constitution of Arbitration Tribunal i.e. 1-3-1985 would be saved by the provisions of Section 20(2) of the M.P. Madhyastham Adhikaran Adhiniyam, 1983 and answering the above question it was held that an application under Section 20(1) of the Arbitration Act which is pending prior to the date on which the Arbitration Tribunal was constituted under the Adhiniyam of 1983 would be saved by sub-section (2) of Section 20 of the Adhiniyam of 1983.The above judgment has no application in the present case as no application is pending before any Court or authority under Arbitration Act.

10. In the instant case, we have already pointed out that the applicant preferred an appeal under Clause 29 of the contract agreement before the Chief Engineer. As per clause 29 of the agreement, the applicant called upon the non-applicants to appoint their arbitrator vide their letter dated 26-9-2005 of Annexure A-7. It would be pertinent to mention here that on 26-9-2005 Arbitration Tribunal under the Adhiniyam of 1983 was already constituted and functioning in the State of Chhattisgarh, therefore, there was a bar of Section 20(1) of the Adhiniyam of 1983 and the only forum available to the applicant was to refer

dispute to the Arbitration Tribunal constituted under Section 7 of the Adhiniyam of 1983 and this Court is of the opinion that cognizance of this application cannot be taken by this Court.

12. In the result, the instant application is dismissed for the aforesaid reasons.

Sd/-
Dhirendra Mishra
Judge

21-12-2006